No. 22128

United States Court of Appeals

for the Ninth Circuit

MELVIN JACK TURNER, Bankrupt,

Appellant,

v.

JULIA L. BOSTON, Trustee in Bankruptcy, and VALLEY CREDIT SERVICE,

Appellees.

Appeal from the United States District Court For the District of Oregon

THE HONORABLE ROBERT C. BELONI, Judge

BRIEF OF APPELLEES

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STATEMENT OF THE CASE

The findings of fact, made by Referee Johnson in his order dated March 6, 1967 and not disputed by Appellant, are substantially as follows:

1. On January 27, 1958 in the United States District Court for the Northern Division of the Western Division of Washington, bankrupt Melvin Jack Turner filed a voluntary petition (No. 44075) and received a discharge in such proceeding.

2. On October 18, 1963, the United States District Court for the District of Oregon, the bankrupt filed a voluntary petition in bankruptcy (B63-3045) but, by order dated December 24, 1963, the bankrupt was denied a discharge in such bankruptcy on the ground that he had been granted a discharge in a former bankruptcy proceeding commenced within six years prior to the date of the filing of the petition of October 18, 1963.

3. On November 14, 1966, the bankrupt filed his third voluntary petition in bankruptcy listing therein all the debts on which discharge had been denied in the order of December 24, 1963.

4. Denial of the discharge in the October 18, 1963, proceeding might have been avoided by the bankrupt by the way of a voluntary withdrawal of his bankruptcy proceeding without prejudice, but bankrupt failed to file any petition asking for such withdrawal and for the setting aside of his adjudication in such proceeding.[1]

[1] Based upon the foregoing findings of fact, Referee Folger Johnson, Jr. ruled that the dischargeability of the debts listed in the petition of October 18, 1963, had been determined and denied by order of the United States District Court for the District of Oregon in Bankruptcy dated December 24, 1963. Inasmuch as the dischargeability of the above described debts had been determined by a court of competent jurisdiction and no appeal had been taken from the determination of that court, it was Referee Johnson's conclusion that the matter was res judicata as determined by the above mentioned court.

LEGAL QUESTION RAISED BY THIS APPEAL

The legal question raised by this appeal is whether or not a denial of a bankrupt's discharge becomes res judicata as to those debts listed in the bankruptcy in which a discharge is denied so that the bankrupt may not discharge those same debts at a later bankruptcy proceeding, or, whether the later discharge should be allowed when the sole ground for denying the discharge in the earlier proceeding was the fact that the bankrupt had received a discharge in a still earlier bankruptcy less than six years before filing the proceeding in which the discharge was denied.

Bankrupt relies specifically upon the case of *In the Matter of Charles S. Masterson, F.d.b.a Prune-Rite Mfg. Co.,* bankrupt, No. 69749 USDC, M.D. California, S.C. 240 Fed Supp. 543 which case was purportedly based upon the case of *Prudential Loan and Finance Co., vs. Robarts,* (*C.A.* 5) 52 F.2d 918.[2]

[2] It is the position of the Appellees that the argument concerning the dischargeability of the debts here in question should have been determined on appeal of the order of December 24, 1963, or, that the petition upon which said order was based should have been withdrawn.

It is elementary that a determination by a court of competent jurisdiction, not appealed from within the applicable period, is res judicata as to the issues determined. The sole issue in the determination of December 24, 1963 was the dischargeability of the debts listed in the petition filed by bankrupt on October 18, 1963. The dischargeability of the debts was denied and, absent appeal, the determination, after notice and upon hearing, is forever binding as to the issue of dischargeability by way of the theory of res judicata.

It is the position of the (Trustee Appellees in Bankruptcy and the objecting creditor, Valley Credit Service), that the *Masterson* case and the *Robarts* case are so different upon their facts and upon the law under which they were decided as to be repugnant rather than complementary. It is the position of the Appellees that the *Masterson* case, supra, could not have stood upon appeal to this Court because of the difference in facts and law upon which each case was decided. The facts in the *Robarts* case, supra, are that Robarts was adjudged a voluntary bankrupt on a petition filed

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Bankrupt appears to rely upon the *In RE Mayorga* 355 F.2d 89 (1966) decision of the Ninth Circuit Court of Appeals. Citation of this case is of no assistance to his position.

In the *Mayorga* decision, supra, this court pointed out very succintly that, if Mayorga had been requesting an outright discharge or presenting a plan of "composition" (rather than the Wage Earner Plan authorized by Chapter XIII of the Bankruptcy Act 11 U.S.C. §§1001-1086) the discharge of his debts would be subject to the six year interval prescribed by the statute.

The Court states at page 90:

"The quoted section thus prescribes at least a six years interval not only between outright and complete discharges in bankruptcy but also between such discharges and other more complex arrangements authorized by the Act, under which a debtor is able to discharge his debts by only partially paying them, that is, by "composition" of them. Since composition results in creditors losing part of their claims, frequent discharges which accompany composition could be habit-forming in the same way that frequent outright discharges are, and they are subject to the prescribed six year interval.
In the instant case Mayorga did not petition for an outright discharge from his debts by invoking ordinary bankruptcy proceedings. He sought to make use of the "Wage Earners' Plans" proceeding authorized by chapter XIII of the Act, [11 U.S.C. §§ 1001-1086.]

July 11, 1922; receiving a discharge on August 23, 1923. On February 26, 1926, the debt in controversy arose by the giving of a note. On March 1, 1927, Robarts filed a second voluntary petition scheduling said note among his debts, and was adjudged a bankrupt. On April 26, 1927, he gave a new note for the balance due, and on June 2, 1927, judgment was rendered on it in a state court. Robarts did not apply for a discharge, and on September 5, 1928, the record was closed in the bankruptcy court. Under this set of facts Robarts would have been entitled to a discharge under Ninth Circuit decisions *Shepherd v. McDonald* 157 F.2d 467 (9th Cir. 1946).

In the proceeding by Robarts, under the Bankruptcy Act as it then was written, there was no objection to his discharge, no hearing held upon the discharge and no finding of the Court that a ground for denial of discharge was present. The Robarts case was *closed* as the policy under the then law, leaving no facts determined by a Court in a specific proceeding.

The *Robarts* case, 52 F.2d 918, at page 919, indicates:

> "***where there is application and objection and express denial of a discharge, the facts adjudged are easily ascertainable, and are usually such as constitute a perpetual bar. Where there is default in applying, it is conclusively established only that a discharge cannot be had for some sufficient reason."

The rational of the *Robarts* case, then, is that the mere denial of a discharge is not the equivalent of a refusal of discharge on the grounds set forth in the statute.

In 1938 the Chandler Amendatory Act to the Bankruptcy Act was passed. The Chandler Act provides that the discharge of a bankrupt shall be automatic unless an objection to the discharge is filed and, when an objection to a discharge is filed the matter is set down for hearing, a hearing is had and a decision is made by the Court. The discharge proceeding in bankruptcy under the Chandler Act has many of the aspects of a separate and distinct suit. If objection has been made to the discharge, there must be a hearing, which is, in effect, a trial in equity. Considering the discharge proceeding in this context, the Courts have uniformly held that an order denying a discharge upon one of the grounds specified in Section 14 is re judicata as to all provable debts scheduled in that proceeding.

The point is well illustrated in the case of *In re Buchanan,* 62 F. Supp. 964. Buchanan was adjudicated a bankrupt in 1945 upon his voluntary petition. He listed in his schedules some twenty-two creditors with provable claims. The Trustee in Bankruptcy objected to a discharge on the ground that in a former proceeding Buchanan had been denied a discharge because he had concealed assets, made fraudulent transfers and

made a false oath. Nineteen of the creditors scheduled in the second proceeding had been listed in the prior one. The Court affirmed the order of the Referee denying a discharge from the debts scheduled in the first proceeding. It rested its decision upon the proposition "that where a Court has denied a discharge and the proceeding has terminated with an adjudication that a bankrupt is not entitled to be discharged from his debts, this adjudication cannot be circumvented or nullified by a discharge of the same debts in the subsequent proceeding. It is an application of the doctrine of res judicata which prevents the relitigation of issues once decided."

The bankrupt, in the *Buchanan* case, argued that the objections of the Trustee did not come within the scope of the specified grounds for denial prescribed in Section 14 since the concealment of assets and the fraudulent transfers of property did not take place within twelve months preceeding the filing of the second petition in bankruptcy. To this the Court said:

> "This argument misses the point. The issue is not whether the bankrupt has been guilty of concealing or transferring assets. The objections are not based on that ground. They are based on the ground that it has heretofore been formally and finally adjudicated that he is not entitled to be discharged from certain debts. The reason for that former adjudication is not material here."

In *In re Schwartz* 89 F.2d, 172 174, the point of view was expressed as follows:

> "In our opinion the most convincing reason to grant a discharge in the second proceeding as against debts provable in the first would, in effect, permit the bankrupt to evade the limitation contained in Section 14a . . . The inference is inescapable that he has sought by this method to extend the statutory period within which to seek a discharge from the debts scheduled in his first proceeding. This he may not do."

The House Report on the 1938 amendment indicates that the change is not to be read too strongly as a new privilege of the bankrupt. The report points out that the new wording saves the bankrupt from the misfortune of failure to get discharged through neglecting to apply in time. But it notes that the new provision will "hasten the proceeding for discharge and prevent intentional delay by a fraudulent bankrupt until such time as creditors have lost interest in the bankruptcy and are less likely to oppose a discharge." HR Rep. No. 1409, 75th Cong., First Sess., 1937, 27.

In *Perlman vs. 322 West Seventy-Second Street Co.,* 127 F.2d 716, 717 (2d Cir. 1942) the Court said:

> "It follows, therefore, that a bankrupt whose estate is closed without his obtaining a discharge is in the same position as one whose discharge was denied.
>
> Analogy to modern rules of procedure also supports this conclusion of res judicata. Under the Federal Rules of Civil Procedure, Rule 41

> (b) . . . applicable to bankruptcies "as nearly as may be" by General Order 37 . . . an involuntary dismissal of an action is with prejudice unless otherwise provided in the order of dismissal. Without deciding how far "with prejudice" goes in a case such as this, we feel safe in saying that the primary object of dismissal with prejudice—preventing harassment of defendants—would be lost if a bankrupt could institute a series of proceedings without loss to himself. Once a person starts a bankruptcy proceeding he, like any other plaintiff, must suffer the consequences of failure to prosecute his cause."

Other cases holding that the 1938 amendment of Section 14a has not weakened the res judicata basis of the rule concerning the effect of a prior discharge are: *Colwell v. Epstein* 142 F.2d 138 (1st Cir. 1944), cert. denied, 323 U.S. 744 65 Sup. Ct. 59, 89 L. Ed. 596 (1944); *In re Schindler,* 73 F. Supp. 741 (E.D.N.Y. 1947).

Under Federal Rule 41 (b) an involuntary dismissal may be without prejudice, if the Court expressly so orders. Where this is done, the *Perlman* case indicates that the dismissal would not be considered a denial of discharge. In that event the bankrupt would not be precluded from obtaining a discharge of the same debts in a subsequent proceeding. It is thus left with the discretion of the Court dismissing the first proceeding to determine when the dismissal is to operate as a bar.

Appellees wish to challenge the statements on page 4 of Appellant's brief that the *Chopnick* case (CA 2) 128 F.2d 521 arose from a situation where a petitioner would fail to request a discharge. The *Chopnick* case, supra, was decided in 1942 and concerned a petition filed in 1940, both of which petitions would have been filed after the amendatory Chandler Act under which the bankrupt was no longer charged with the responsibility for requesting a discharge. The *Chopnick* case, supra, and the *Masterson* case, supra, under which Appellant contends were both decided after the Chandler amendment and, it is inconceivable to Appellees that the *Masterson* case, supra, could have survived appeal to the Ninth Circuit Court of Appeals since it is based upon only 1 case decided 34 years prior and under a substantially different law.

Apparently there is only one United States Supreme Court discussion of this matter and this appears in *Freshman v. Atkins* 269 U.S. 121, at p. 122, 123:

> A proceeding in bankruptcy has for one of its objects the discharge of the bankrupt from his debts. In voluntary proceedings, as both of these were, that is the primary object. Denial of a discharge from the debts provable, or failure to apply for it within the statutory time, bars an application under a second proceeding for discharge from the same debts. *Kuntz v. Young,* 131 Fed. 719; *In re Bacon,* 193 Fed. 34; *In re Fiegenbaum,* 121 Fed. 69; *In re Springer,* 199 Fed. 294; *In re Loughran,* 218 Fed. 619; *In re Cooper,* 236 Fed. 298;

> *In re Warnock,* 239 Fed. 779; *Armstrong v. Norris,* 247 Fed. 253; *In re Schwartz,* 248 Fed. 841; *Horner v. Hamner,* 249 Fed. 134; *Monk v. Horn,* 262 Fed. 121. A proceeding in bankruptcy has the characteristics of a suit, and since the denial of discharge, or failure to apply for it, in a former proceeding is available as a bar, by analogy the pendency of a prior application for discharge is available in abatement as in the nature of a prior suit pending, in accordance with the general rule that the law will not tolerate two suits at the same time for the same cause.

Bankrupt discusses "honest mistake" in filing within the six year prohibition period. This argument misses the point completely. The point here is that the dischargeability of the debts in the question has been litigated and denied. The bankrupt's conduct is not before this court. What is before this Court is a determination by a court of competent jurisdiction upon the merits of discharge as to particular debts and, in accordance with this court's observation in the *Mayorga* case, supra, the six year interval prescribed by the statute is designed to prevent frequent outright discharges from becoming habit forming. Mayorga was allowed to file his Wage Earner Plan within the six year prohibition period because it indicated payment in full of his debts and a discharge would be a mere formality.

CONCLUSION

The decision of Judge Belloni and Referee Folger Johnson, Jr., should be affirmed and discharge denied as to those debts listed in the present petition which were previously listed in the petition filed October 18, 1963, upon the grounds and for the reason that the dischargeability of said debts has been adjudicated by a court of competent jurisdiction and that the reason for the denial of the previous discharge is not before this court.

Respectfully submitted,,

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Trustee in Bankruptcy

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

Dated: .... day of October, 1967.

JULIA L. BOSTON
Trustee in Bankruptcy